



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: JANUARY 24, 2023

IN THE MATTER OF:

Appeal Board No. 626095

PRESENT: MARILYN P. O'MARA, MEMBER

In Appeal Board Nos. 626094, 626095, 626096, the claimant appeals from the combined decision of the Administrative Law Judge filed September 6, 2022, insofar as the combined decision modified and sustained the initial determination, holding the claimant ineligible to receive benefits, effective March 23, 2020, through May 28, 2021, on the basis that the claimant was not available for employment, to be effective March 23, 2020, through June 14, 2020, and to be effective June 22, 2020, through May 27, 2021 (inadvertently set forth as May 28, 2021, in the initial determination); and sustained the remaining initial determinations, charging the claimant with an overpayment of \$7,100.00 in benefits recoverable pursuant to Labor Law § 597 (4); charging

the claimant with an overpayment of Federal Pandemic Unemployment Compensation of \$16,200.00 recoverable pursuant to § 2104 (f)(2) of the Coronavirus Aid,

Relief and Economic Security (CARES) Act of 2020; charging the claimant with an overpayment of Pandemic Emergency Unemployment Compensation of \$9,656.00 recoverable pursuant to § 2107 (e)(2) of the Coronavirus Aid, Relief and

Economic Security (CARES) Act of 2020; charging the claimant with an overpayment of Lost Wages Assistance benefits of \$1,800.00 recoverable pursuant to 44 CFR § 206.120 (f)(5); reducing the claimant's right to receive

future benefits by 80 effective days; and charging a civil penalty of \$4,943.40 on the basis that the claimant made a willful misrepresentation to obtain benefits.

At the combined telephone conference hearing before the Administrative Law Judge, testimony was taken. There were appearances on behalf of the claimant, the employer, and the Commissioner of Labor. After the decision was issued, the Appeal Board considered, on appeal, the arguments contained in the written statement submitted on behalf of the claimant.

Our review of the record reveals that the case should be remanded to hold a further hearing. The record was not sufficiently developed on the initial determinations of availability, recoverable overpayments and wilful misrepresentations. The parties should have another opportunity to submit additional testimony and other evidence on these issues.

At the further hearing, additional testimony and evidence should be taken from the parties as to the claimant's previous employment and assignments, and whether any such work performed was done remotely. Any documentary evidence in support of such testimony shall be offered at hearing for potential entrance into the record.

The Commissioner of Labor should appear and present evidence in the claimant handbook, insofar as the certifications related to the claimant's availability. The parties will offer additional testimony as to the receipt and/or access to the claimant handbook, the version available to the claimant at the time of her claim, whether it was available in Spanish, whether the claimant read/accessed the handbook, and the instructions set forth therein as to availability. Any documentary evidence relevant to such discussion shall be offered at hearing for entrance into the record after objection.

The Commissioner of Labor should also be prepared to discuss the Department of Labor's social media account on Twitter as related to the "tweets," statements made on about April 23, 2020, regarding how to certify due to the Covid-19 pandemic. The parties will be questioned further as to the tweet, whether they read the tweet, how and when, as well as any additional threads of that same tweet, and comments and clarifications made by the Department of Labor on Twitter. Any documentary evidence relevant to such inquiry shall be produced at hearing for entrance into the record after an opportunity for objection.

The Administrative Law Judge should then proceed to take any additional testimony and evidence necessary to complete the record.

Now, based on all of the foregoing, it is

ORDERED, that the decision of the Administrative Law Judge, insofar as it sustained the initial determinations, and the same hereby is, rescinded; and it is further

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issues ONLY, upon due notice to all parties and their representatives; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, and, so that at the end of the hearing, all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, on the issues, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

MARILYN P. O'MARA, MEMBER